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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 22 22

THE UNITED STATES OF AMERICA,
Appellant,

v.

YELLOW CAB COMPANY, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEES

GALLOP CLIMENKO GOULD & LYNTON
Attorneys for Appell- s

JESSE CLIMENKO
HAROLD S. LYNTON
of Counsel

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2
Background of Litigation	3
Statement of the Case	4
CCM at January 1929	4
Yellow at January 1929	5
Early Miller-Markin Discussions	7
Negotiations leading to formation of Parmelee	8
Formation of Parmelee	9
Lack of control of Parmelee by CCM or Markin	10
J. A. Sisto & Co. not a medium for control over Parmelee	14
The 1929 orders of Yellow and Yellow of New York	15
CCM's 1929 Minutes	16
Parmelee Pittsburgh Subsidiary	18
CCM's 1930 acquisition of a majority of Parmelee's common shares	20
Organization by Parmelee of Minneapolis subsidiary	24
Temporary Cab Operations in Chicago of DeLuxe Motor Cab Co. and Chicago Cab Co.	25
Parmelee's Present Cab Operating Affiliates	26

PAGE

Relation of CCM to Checker and Evolution of Cab Sales 28

Present affiliation of Cab Sales and CCM 32

CCM's Cab a Superior Purpose-Built Cab 32

The Tendency to Uniform Cab Purchases by Fleets Operating in the Larger Cities of the United States 34

No Contracts Exist for Exclusive Purchases of CCM Cabs by Cab Sales, Yellow or any of the Cab Operating Subsidiaries of Parmelee 35

Comparison of Cab Sales by CCM Before and After January 1, 1929 35

Comparison of CCM's Cab Sales to Total National Cab Sales, and Position of CCM in Relation to Other Automotive Manufacturers 36

Comparison of Total Assets and Liabilities of CCM, Parmelee and Chicago Yellow 37

Municipal Regulations of Taxicabs and Rates 37

Summary of Argument 38

ARGUMENT—

I. The Government's theory that the purchase of an outlet with the intent to assure a market constitutes a violation of the Sherman Act, regardless of the reasonableness of the resulting restraints, is opposed to the Columbia Steel case and misapplies the pleading decision of the first Yellow Cab case. When only reasonable restraints result, no Sherman Act violation occurs unless the purchase is aimed at a suppression of competition 39

PAGE

II. The District Court properly found that the defendants did not conspire to suppress any competition by automotive manufacturers other than CCM, or even to coerce purchases of CCM cabs 44

III. The Government's specifications of error do not urge that, absent a proscribed specific intent, unreasonable restraints exist; and no such unreasonable restraints do exist 46

IV. In the event of reversal divestiture should not be directed 49

Conclusion 50

CASES CITED

Associated Press v. United States, 326 U. S. 1, 22 ..... 41, 49

Binderup v. Pathe Exchange, 263 U. S. 291 41

Montague & Co. v. Lowry, 193 U. S. 38 41

United States v. Columbia Steel Co., 334 U. S. 495, 496, 508-511 ..... 38, 39, 47

United States v. Crescent Amusement Co., 323 U. S. 173 ..... 41, 46, 49

United States v. Paramount Pictures, Inc., 334 U. S. 131, 174 43

United States v. Reading Co., 253 U. S. 26 41

United States v. Yellow Cab Co., 332 U. S. 218 ..... 3, 38, 40

United States v. United States Gypsum Co., 333 U. S. 364, 395 46

STATUTES

15 U. S. C. 1 (Sherman Act) 2

15 U. S. C. 2 (Sherman Act) 2

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OPINION BELOW

The opinion of the District Court for the Northern District of Illinois (R. 89) is reported at 80 F. Supp. 936. An earlier opinion of the District Court, dismissing the complaint under Rule 12(b) of the Rules of Civil Procedure for failure to state a claim, is reported in 69 F. Supp. 170, and the opinion of this Court on the appeal taken from the judgment of dismissal is reported in 332 U. S. 218.

JURISDICTION

The judgment of the District Court was entered on November 10, 1948 (R. 104). Petition for appeal was filed and allowed on January 7, 1949 (R. 104, 108). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on March 7, 1949 (R. 1674).

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *" (15 U. S. C. 1).
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *" (15 U. S. C. 2).

QUESTIONS PRESENTED

1. Whether the evidence sustains the findings of the District Court that the appellees did not conspire to suppress competition, in interstate sales of taxicabs, of automotive manufacturers other than CCM.

2. Whether, if the appellant's specifications of error permit review, unreasonable restraints on interstate sales of automobiles used as taxicabs result from CCM's affiliations with five cab operating companies.

3. Whether, in the event of reversal, divestiture should be directed by this Court without affording to the District Court opportunity, after full hearing, to determine the requisite relief.

The Government does not urge error (Govt. Br., p. 5, note 1) as to the findings of the District Court that no conspiracy existed among the appellees relative to the transfer by Parmelee of railroad passengers and their luggage between Chicago railroad stations.

BACKGROUND OF LITIGATION

This action was originally conceived as an attack on the license rights of Yellow and Checker under the 1937 ordinance of the City of Chicago, and as a method of avoiding the decision of the Illinois Circuit Court sustaining these rights (*Yellow Cab Co.* v. *City of Chicago*, decided February 25, 1946, Feinberg, *J.*, Ex. D-5, R. 1608, affirmed by the Illinois Supreme Court, 396 Ill. 388, Ex. D-6, R. 1609). To invoke federal jurisdiction, the concept was evolved that taxicab services in Chicago were an adjunct to interstate railroad transportation, and to spread additional color of interstateness, sales of taxicabs by CCM, a Michigan manufacturer, and transportation by Parmelee of railroad passengers and their luggage between Chicago railroad stations were linked with these taxicab services. When the decision of this Court, *United States* v. *Yellow Cab Co.*, 332

U. S. 218, removed from this action its supposed primary basis of federal jurisdiction, the furnishing of taxicab services in Chicago, this action was left only with its appendages, the sales of cabs by CCM and the interstation transportation of Parmelee. Since the Government has abandoned on this appeal its charge respecting Parmelee's interstation transportation (Govt. brief, p. 5, note 1) the only surviving remnant is the sales of cabs by CCM.

This evolution explains the shifting theories of the Government during the course of this action and indicates how the Government by retrospective speculation and disregard of basic facts, chronology, and economic and business conditions, has endeavored to discover a pattern of supposed conspiracy to meet its preconceived theories. The shifts in the Government's position have finally resulted in placing it in the curious position of championing against CCM, an extremely small automotive manufacturer, the "giants of the industry," General Motors, Chrysler, Ford and Packard.

STATEMENT OF THE CASE

CCM at January 1929

By January 1929 CCM had been a manufacturer of purpose-built taxicabs for about seven years and had sold an aggregate of 8,019 cabs, or an average of 1,356 cabs a year (R. 803; Ex. D-13, R. 1628).

It produced in 1928 its Model K cab (illustrated in Ex. D-9, facing R. 1612) which had the appearance of a town-car and was widely acclaimed as the outstanding purpose-built cab of its day (R. 804-805, 838-839, 910; Ex. D-9, R. 1612).

CCM's sales were usually on an installment basis under conditional sales contracts and were financed by discount corporations, including Commercial Credit Corporation and Fisk Discount Corporation. Even prior to 1929, purchasers of cabs from CCM sometimes defaulted on their installments, necessitating financial losses and adjustments by CCM. (R. 815, 925; Ex. 1, R. 968; Ex. 42, R. 1059-1062; Ex. 73, R. 1109-1110; Ex. 88, R. 1126-1127)

Yellow at January 1929

The "Yellow" organization traces back to 1910. By 1925, its components included (1) Yellow Cab Manufacturing Company which manufactured the "Yellow" purpose-built cab, (2) Yellow, which conducted cab operations in Chicago, and purchased its cab requirements from Yellow Cab Manufacturing Company, and (3) Chicago Yellow, a holding company, which owned the stock of Yellow Cab Manufacturing Company and of Yellow (Ex. D-15, R. 1644; R. 832-834). From 1910 to 1925 the executive direction of these Yellow companies and a substantial stock interest in Chicago Yellow was increasingly in John D. Hertz and Hertz possessed also an important stock interest in Yellow Taxi Corporation, New York (referred to as Yellow of New York) which operated "Yellow" cabs in New York. (R. 669, 834, 837, 852-853)

Shortly before 1925 Hertz determined to withdraw from the taxicab business. He was partly motivated by the presence of force and violence in taxicab operations on the streets of Chicago, which later was strikingly illustrated by threats to kidnap his grandson and the burning of his racing stables. (R. 834-835)

In 1925 Hertz sold Yellow Cab Manufacturing Company to General Motors Corporation (R. 668, 833-834). Immediately after this acquisition, General Motors Corporation changed the name of Yellow Cab Manufacturing Company to Yellow Truck and Coach Company (R. 669, 836). That company within a short time transferred its plant from Illinois to Michigan and began to engage principally in the business of truck and bus manufacture (R. 669, 835-836). Its name was later changed to General Motors Truck Corporation (R. 836).

With the withdrawal of Yellow Cab Manufacturing Company from the production of purpose-built taxicabs, the "Yellow" cab operating companies lost their previous source of supply. By 1929 their fleets were about 3-4 years old, and they constituted available customers for another purpose-built cab (R. 669, 837, 850, 852). In this situation, CCM's Model K was a natural purchase.

Hertz, however, having sold Yellow Cab Manufacturing Company to General Motors Corporation, continued to look for purchasers for his interests in Chicago Yellow and Yellow of New York (R. 852). Hertz' interest in Yellow was represented by Charles McCullough who was Chairman of the Board of Chicago Yellow and also of The Parmelee Company, with which McCullough had been associated for many years and in which he personally possessed an important stock interest (Ex. 6, R. 1527; R. 838). Hertz' interest in Yellow of New York was represented by Ernest H. Miller who was president of Yellow of New York, president and owner of Yellow Cab Company of Newark, and generally an important and well-known figure in the field of taxicab operations (R. 747, 837, 852-853; Ex. 6, R. 1527-1528).

Early Miller-Markin Discussions

Against these circumstances of the acclaim accorded to CCM's Model K cab, the withdrawal of the Yellow companies' previous source of supply of purpose-built cabs, and Hertz' desire to sell his interests in Chicago Yellow and Yellow, the first conversations between Miller and Markin occurred. These conversations were initiated by Miller and transpired about mid-summer 1928 (R. 910-911).

Miller said that he was operating cabs in New York and Newark, that he saw CCM's new Model K cab, that he thought it was a very good cab, and that he would like to buy some. Later he said that because of finances he probably was not able to do it. Somewhat later still, he said that the cab purchases might be financed if buyers could be found for the interests of owners of Yellow, Yellow of New York and Yellow of Newark, who wanted to sell their interests. Miller thought that finances could be found, and Markin said that he would look around. (R. 910-912)

These conversations were limited to the quality of CCM's Model K cab and the possibility of the sale of stock interests in Chicago Yellow, Yellow of New York and Yellow of Newark. Miller did not, as stated at page 9 of the Government's brief, broach the idea of "forming a company to acquire stock of various taxicab companies"; nor was there any "deal to acquire stock of cab companies" (Id.). These conversations antedated the negotiations which led to the formation of Parmelee, antedated any discussions between Markin and J. A. Sisto & Co., and antedated J. A. Sisto & Co.'s public issue of CCM's securities in November 1928. Accordingly, CCM's directors were not, as also stated at page 9 of the Government's brief, familiar with these early discussions.

Negotiations leading to formation of Parmelee

Markin spoke with J. A. Sisto & Co., underwriters, concerning the possibility of financing the purchase of these three Yellow companies. Sisto replied that it might be interested in such financing. Miller then arranged an appointment at Chicago, and McCullough, Miller and Markin met. The discussions concerned the purchase price for the stock interests represented by McCullough in Chicago Yellow and by Miller in Yellow of New York. The purchase of Yellow of Newark was dropped because Miller wanted too much money for it. During the meeting, Markin asked McCullough why such interests were being sold. McCullough said that he wanted to retire from active business. Markin asked whether McCullough proposed to remain in The Parmelee Company. McCullough replied that The Parmelee Company interests also desired to sell. (R. 912-915)

The "deal" under negotiation was limited, therefore, to two cab operating companies, Yellow (whose stock was owned by Chicago Yellow) and Yellow of New York and to The Parmelee Company which was engaged in the separate business of interstation transfer of railroad passengers and their luggage. Markin specifically testified that only "one deal" was involved and not a plan to acquire cab operating companies throughout the United States (R. 614). He further testified that the deal was changed only by eliminating Newark (R. 617), and that no other cities were to be added (R. 617).

Markin reported his Chicago meeting to J. A. Sisto & Co. which turned the matter over to its statistical department and examined the properties. Sisto, in association

with two other underwriting firms, Hallgarten & Co. and White, Weld & Co., investigated the proposed purchase and evolved the operating and financial structure of Parmelee. Markin did not participate in any of the discussions among the underwriters or their counsel relative to the conception or formation of the new enterprise. The conception and formation of Parmelee, including its subsidiary, Transportation Management Corporation, was entirely the underwriters' and their counsel. (R. 915-919)

As already indicated, the proposed purchase of stock interests in Chicago Yellow, Yellow of New York and The Parmelee Company, represented to Markin a limited "deal." Any suggestion that Parmelee might constitute a nucleus for acquiring other cab operating companies in the United States represented possibly the promotional technique of underwriters desiring to float its securities.

Formation of Parmelee

Parmelee was formed April 12, 1929. Its securities were publicly issued through an underwriting syndicate headed by the firms of J. A. Sisto & Co. and White, Weld & Co. (Ex. 6, R. 1520-1529).

These securities consisted of $5,000,000 of debentures, $1,000,000 of preferred shares and 250,000 common shares of the value of $4,600,000 (Ex. 4, R. 1504).

Shortly after its formation, Parmelee acquired the following (Ex. 4, R. 1495, 1503):

(1) 26 per cent of the stock of Chicago Yellow, the parent of Yellow. These were the shares which McCulloch sold for the interests represented by him.

(2) 68 per cent of the stock of Yellow of New York. These were the shares which Miller sold for the interests represented by him.

(3) 96 per cent of the stock of The Parmelee Company. These were the shares which McCulloch sold for himself and interests represented by him.

To achieve economies of operation through a single advisory staff, Transportation Management Corporation was formed as a wholly owned subsidiary of Parmelee (Ex. 7, R. 1559-1573).

Lack of control of Parmelee by CCM or Markin

On Parmelee's formation, CCM purchased $1,000,000 of preferred shares of Parmelee, without voting power (Ex. 2, R. 1477; Ex. D-16, R. 1645-1646; R. 905-906).

J. A. Sisto & Co., as part of its financing desired that CCM purchase not preferred but common shares of Parmelee and in an amount exceeding $1,000,000 (R. 917-918). Markin and others of the CCM officers and directors desired that CCM purchase not preferred shares but debentures and in an amount not more than $1,000,000. (R. 918) CCM's purchase of the $1,000,000 of preferred shares of Parmelee represented, therefore, an investment whose status was between an equity ownership of common shares and a debenture holder's creditor position.

Thus, not only had CCM no voting power in Parmelee but it refused to accept securities possessing such voting power, seeking a safer investment. The Government observes that the preferred shares were convertible into common shares. They were, and so were the $5,000,000

of debentures. The issuance price of the common shares was, however, $24.50 per share against a conversion price, both for the debentures and preferred shares, of $30 per share (Ex. 6, R. 1520, 1523, 1527). If, however, CCM were conspiring in early 1929 to acquire domination of Parmelee by deliberate calculated purchase for control, it is hardly likely that CCM would have declined the acquisition of voting equity stock in favor of non-voting preferred stock.

Markin, at the time of Parmelee's formation, owned 12 per cent of the stock of CCM (Ex. D-7, R. 1611). In connection with the organization of Parmelee, and on the insistence of the underwriters, he subscribed for and purchased 6 per cent of Parmelee's common stock (R. 917; Ex. 2, R. 1475; Ex. D-8, R. 1611-1612). Thus, obviously, Markin possessed stock control neither of CCM nor Parmelee.

It may be observed that on the prior appeal, this Court assumed a construction of the original complaint which the proof did not support. Summarizing the allegations of the original complaint, Mr. Justice Murphy said in part:

> "Parmelee Transportation Company (Parmelee) was organized in April, 1929 with 62% of its stock being owned by CCM" (332 U. S. 218, 221).

CCM did not, however, in April 1929 own 62 per cent of Parmelee's stock; CCM owned only preferred stock which was without voting power and represented only 9 per cent of Parmelee's total capitalization.

Again Mr. Justice Murphy, summarizing the original complaint, said that Markin, in January 1929, was not

only CCM's president and general manager, but also its "controlling stockholder" (332 U. S. 218, 221). So construed, this allegation also was unsupported by the proof. In January 1929 Markin owned 15 per cent of the stock of CCM, and on April 12, 1949 (the date of Parmelee's formation) only 12 per cent (Ex. D-7, R. 1611).

Nor did CCM or Markin possess any control over the officers or directors of Parmelee. Markin himself was neither an officer nor a director of Parmelee or any of its affiliates (Exs. 4-7, R. 975, 982, 984, 987; Ex. 222, R. 1290; Ex. 224-226, R. 1290).

Markin's sole connection with Parmelee, aside from his personal subscription to 6 per cent of Parmelee's common shares, was as consultant to Miller in Miller's capacity as president of Transportation Management Corporation (Ex. 7, R. 1548). Markin was employed as such consultant in his personal capacity, partly because of his expert knowledge of the taxicab field, and partly because the underwriters of Parmelee's public issue desired that the new enterprise initially have the benefit of the advice of a person whom they knew and in whom they reposed confidence (R. 916-917). Markin's contract as such consultant was for two years at a salary of $25,000 a year (Ex. 7, R. 1548-1549).

Transportation Management Corporation functioned as an advisory staff for the three operating companies affiliated with Parmelee, Yellow, Yellow of New York and The Parmelee Company, under advisory contracts (Ex. 7, R. 1559-1573).

The Government argues at page 52 of its brief that a paragraph contained in these contracts (Ex. 7, R. 1560, 1566,

1569-1570) relating to purchases in excess of $500, was not an advisory but a control device, and then assumes that such control was exercisable by CCM. This paragraph provides that purchases in excess of $500 shall not be made "without either obtaining the approval of the management corporation or instructions from the board of directors of the particular company for which such purchase is to be made." It appears from the very terms of this paragraph, however, that the directors of Yellow, Yellow of New York, and The Parmelee Company were entirely free to disregard the advice of Transportation Management Corporation and to issue such instructions as they might desire; and it is consequently obvious that this paragraph was neither intended nor functioned as a control device. But even beyond this, Transportation Management Corporation was a wholly owned subsidiary of Parmelee and had no relationship to CCM; and, consequently, Transportation Management Corporation's advisory contracts were neither available to, nor exercisable by, CCM. The real purpose of this paragraph was that the underwriters who evolved Transportation Management Corporation desired coordination of purchases to achieve mass economies and did not want any particular officer or employee of the new enterprise to make any purchases of substance, whether gasoline, tires or other important supplies or equipment, without the opportunity of obtaining the benefit of the economies of such mass purchases (Ex. 6, R. 1528). In like manner as with respect to purchases, the advisory contracts provided that no lease for the rental of premises should be made without "either obtaining the approval of the Management Corporation or the approval of the directors of the Company for which such lease is

to be made" and generally provided that "the Management Corporation will place at the services of the Companies its combined experience, advice and assistance," including accounting, purchasing, statistical, insurance, public relations, employee relations, technical problems, advertising, rental and other services. All these services were, however, subject "to the direction and control * * * of the Companies for which such services are to be rendered" (Ex. 7, R. 1564, 1568, 1573; Ex. 21, R. 1587).

Because Transportation Management Corporation provided such advisory staff, the overhead burden of the operating companies for executive personnel was decreased. Thus, for example, Miller, who continued as president of Yellow of New York, received no salary except from Transportation Management Corporation (Ex. 7, R. 1547). The general economies effected through Transportation Management Corporation are indicated by the saving to Yellow alone of $510,000 in one year (R. 245-246).

J. A. Sisto & Co. not a medium for control over Parmelee

J. A. Sisto & Co. is not a defendant and, of course, is not included in the allegations of the complaint that the "defendants" combined and conspired.

Fundamentally, however, Sisto could not have been a medium for control over Parmelee. It was an underwriter interested in the marketing of securities. Its desire and that of its associated underwriters was to sell the Parmelee securities which they underwrote and not to retain them (Ex. 6, R. 1520, 1523).

Indeed, the formation of Parmelee was, from the viewpoint of the underwriters, essentially the creation of securities to be marketed to the public. It is hardly likely that a conspiracy for control would have been rested on so slender a reed as the continued holding by an underwriter of securities which it is the function of the underwriter to sell to the public.

The 1929 orders of Yellow and Yellow of New York

During 1929, Yellow purchased 1035 Model K cabs from CCM, and Yellow of New York 1,000 (Ex. 453, R. 1458). The Government seeks to interpret these purchases as the "speedy fulfillment" of a conspiracy. They constituted, however, only overdue replacements required by Yellow and Yellow of New York for their fleets (R. 837, 839, 850, 852). Miller in mid-1928 had previously expressed the desire of Yellow of New York to buy CCM's Model K cab, and Yellow in late 1928 or early 1929, before the formation of Parmelee, sent its executives to CCM's plant to inspect the Model K cab (R. 839, 852). Both Yellow and Yellow of New York had always operated a purpose-built cab—the "Yellow" purpose-built cab (R. 833-834)—whose supply ceased with the 1925 sale of Yellow Cab Manufacturing Company and its withdrawal from taxicab manufacture. Accordingly, these 1929 purchases were not coerced but were made because Yellow and Yellow of New York needed cabs, because CCM's Model K was the outstanding purpose-built cab of the day, and because CCM provided a natural source of supply of purpose-built cabs when Yellow Cab Manufacturing Company withdrew.

CCM's 1929 Minutes

The Government argues that the minutes of two meetings of directors and one meeting of stockholders of CCM in 1929 disclose that the specific intent of CCM in "the formation of Parmelee" was "to assure a captive market for CCM cabs" (Govt. Br., p. 42).

It will be noted that the Government does not argue that these minutes disclose a specific intent to "suppress competition" of other automotive manufacturers; the Government limits its argument to a specific intent to assure a captive market for CCM cabs. The distinctions under the Sherman Act between these specific intents will be considered more fully below at pages 39-44. Not only, however, do these minutes not disclose any aim to suppress the competition of other automotive manufacturers but they do not support any inference of a specific intent to coerce, by power exerted against cab operating affiliates, long term buying of CCM cabs without regard to merit.

Against the background of existing facts, these minutes are properly interpreted as disclosing an immediate order by Yellow for 1,000 Model K CCM cabs for cash—and not on any deferred installment basis; the investment of $1,000,000 by CCM in preferred stock of substantial cab operating companies whose financial resources would enable them to pay cash for cab purchases; and the hope (and expectation) by CCM to receive, in addition to a profitable investment, the continued good-will of a potential customer for cabs. CCM was the natural supplier of Yellow and Yellow of New York's 1929 cab requirements. An investment by CCM, in connection with its 1929 orders, was certainly a normal business matter and the creation of cus-

tomer good-will. This is far short of an inference that Yellow's 1929 order was coerced and evidenced a specific intent to coerce through power long term purchases of CCM cabs regardless of merit.

The minutes of these three meetings record (Exs. 1-3, R. 967-975) that Markin indicated that "the amalgamation between some of the more important operating companies" and the investment by CCM of $1,000,000 in preferred shares of that amalgamation, might be of benefit to CCM because that amalgamation represented a potential customer for CCM cabs, and because such customer adequately financed through a public issue "would be in a position to pay cash," instead of purchasing cabs on a deferred installment basis. Thus, Markin's statements were that "He felt that in this way this Company [CCM] would be in a position to receive recurring orders from substantial operating companies that would be in a position to pay cash" (Ex. 1, R. 967-968); that CCM "might obtain a sustained production by insuring recurring orders from large operating companies" (Ex. 2, R. 969); and that he deemed CCM's investment in the preferred shares of such potential customer "advantageous in supplying a connection for marketing the products of this Corporation" (Ex. 3, R. 975).

Markin as a fiduciary (officer and director of CCM) also disclosed at these meetings his opportunity personally to make some money. That this was so understood by the directors of CCM appears from the statement of Halff, a director, that he "hoped that Mr. Markin, individually, would make considerable money as a result of his efforts" (Ex. 1, R. 968). Markin had a personal contract with CCM under which he was required to devote his full time

to the business of CCM. Markin desired an express modification of this contract so that he might be employed as a consultant to Miller. This modification was effected. (Ex. 2, R. 971-972)

The Government's argument at pages 39-41 of its brief that the District Court found that Markin acted only in his personal capacity is incorrect. Markin acted, and the trial court found that he acted, both for the benefit of CCM and in his personal capacity. He acted for CCM's benefit in arranging for the 1,000 Model K cab order from Yellow and in recommending the $1,000,000 preferred stock investment as supplying an "advantageous connection" with a potential customer. He acted personally with respect to his own subscription to Parmelee's shares and his compensation as adviser to Miller. What is important is that Markin's report of these personal relations was not as argued by the Government, the baring of the inner workings of a conspiracy, but only an appropriate disclosure by a fiduciary who might personally benefit. If, indeed, any such conspiracy had been formulated, it would be highly improbable that any conspirator under advice of counsel would record its conspiracy on the minutes of a public corporation.

Parmelee's Pittsburgh Subsidiary

The Government argues that this acquisition was in fulfillment and constitutes evidence of the original "conspiracy". The proof, however, is forcibly to the contrary—shown most strikingly by Markin's opposition to this acquisition.

In 1928, before the Miller-Markin discussions, Laird, president of Yellow Cab Company of Pittsburgh, approached Miller with the suggestion that Miller purchase this Pittsburgh cab operating company. Nothing came of the suggestion at that time. (R. 902-903) In 1929, however, after Parmelee's formation was announced by the newspapers, Laird again approached Miller with the suggestion that Parmelee purchase this Pittsburgh company (R. 903-904). Miller discussed the possibility of this purchase with Markin who advised against it on the ground that, because of its topography, Pittsburgh was not a profitable location for the operation of taxicabs (R. 921). The negotiation and purchase which ensued was conducted between Miller and Laird. Markin did not participate in this negotiation or purchase. (R. 904, 921-922)

Parmelee's subsequent purchase in 1929 of Pittsburgh Transportation Company was the result of negotiations between Houston, president of Pittsburgh Transportation Company, and Miller. Based on Pittsburgh's topography, Markin's advice was against this purchase also, and Markin did not participate in the negotiation or the purchase (R 904, 921-922).

Prior to 1929, these Pittsburgh companies had operated purpose-built cabs. Yellow of Pittsburgh used, of course, the Yellow purpose-built cab which in 1929 was no longer in supply. Pittsburgh Transportation Company had been a customer of CCM (R. 804). The 1929 purchases by these companies of an aggregate of 248 CCM Model K cabs (Ex. 459, R. 1461-1462) were, therefore, the natural purchases.

The suggestions at page 16 of the Government's brief that a provision in the purchase agreement relating to Pittsburgh Transportation Company, that between the date of the agreement and the date of closing that company would "make no unusual commitments or contract any liabilities or purchase any cabs or equipment, or any shares of its preferred or common stock except in the ordinary course of business," shows a "contemporaneous purpose to obtain for CCM a monopoly of sales in cabs to the acquired company" indicates the slender threads with which the Government attempts to draw an inference of conspiracy. The quoted provision in the purchase contract is, of course, the usual provision found in every contract for the purchase of any business; it merely assures that no substantial change in assets or liabilities or character of business will occur between the date of the agreement and the closing.

CCM's 1930 acquisition of a majority of Parmelee's common shares

The crucial question with respect to this acquisition, states the Government at page 24 of its brief, is whether its purpose was "to assure maintenance of captive outlets for CCM cabs" or whether it was "a mere by-product of investment by CCM in a business which CCM believed would be profitable." The question is not quite that—rather it is whether this was an acquisition aimed at the suppression of competition of automotive manufacturers other than CCM, or resulted from business considerations affecting Parmelee's financial condition and cab operations.

The facts evidence neither a specific intent to suppress competition nor to assure maintenance of captive outlets.

The Government argues that the testimony of the witnesses should not be believed—that this acquisition was not a result of the business considerations to which those witnesses testified. It argues that after such testimony is disregarded, a specific intent to maintain a captive market may be inferred from CCM's willingness to convert its debenture and preferred stock holdings into common shares of Parmelee—that "the measure of the importance placed by CCM upon obtaining stock control of Parmelee is what CCM was willing to pay to get control" (Govt. Br. p. 25). It argues such inference not only in disregard of such testimony but also in disregard of the fact that a major portion of the common Parmelee shares received by CCM was in exchange for the stock of a New York cab operation owned by Markin which the Raskob-duPont group, representing the dominant stockholders of CCM, insisted that Markin dispose of. The facts were these:

The business depression following the stock market crash of October, 1929 had substantially impaired Parmelee's financial condition and cab operations (R. 407, 928; Ex. 74, R. 1111). Parmelee's 1930 losses were additionally accentuated by a severe strike in Pittsburgh (R. 275).

Parmelee's annual burden of interest charges and sinking fund requirements on its debentures and cumulative dividends on its preferred stock aggregated $526,667, comprising $300,000 of interest (Ex. 6, R. 1526), $166,667 for sinking fund (Id., R. 1526-1527) and $60,000 of preferred dividends (Id., R. 1526). Of these securities, CCM owned $1,442,000 of debentures and $1,000,000 of preferred stock. The debentures had been acquired by CCM at a discount in the early summer of 1930 when J. A. Sisto & Co. as a result

of the October 1929 stock market crash and subsequent depression was in financial difficulties but before its ultimate liquidation (R. 810, 927; Ex. 64, R. 1094).

Additionally at this time Yellow of New York, a Parmelee subsidiary, was facing the competition of a fleet of 2,050 CCM Cabs in New York City which were operated by subsidiaries of Motor Cab Transportation Corporation, a company formed in early 1929 by Markin and substantially all of whose stock Markin owned (R. 813-814, 925; Ex. 62, R. 1085-1086, 1088).

In mid-1930 CCM's largest stockholder was a group represented by Raskob and duPont, which owned in excess of 34 percent of CCM's outstanding stock (R. 811, 925-926). At this time Markin's ownership of CCM's stock was only 5 percent and his ownership of Parmelee's common stock was less than 1 percent (R. 811; Ex. D-7, R. 1611; D-8, R. 1611-1612). Raskob, representing the Raskob-duPont group, asked Markin to dispose of his Motor Cab stock in order that Markin through this corporation might not be in competition in New York with Yellow of New York and other customers of CCM. Markin at first declined but Raskob insisted and it became obvious that Markin would have to comply. Raskob suggested that Markin dispose of his Motor Cab stock direct to Parmelee and, since Parmelee was unable to pay cash, that Parmelee issue to Markin, in exchange, Parmelee common shares. Markin did not wish to exchange his Motor Cab stock at this time for Parmelee common shares. Additional negotiations followed, into which Miller entered on behalf of Parmelee. Miller suggested that Parmelee's financial strain would be eased if the $1,442,000 of debentures and the $1,000,000 of preferred

shares of Parmelee then owned by CCM, carrying a current burden of interest charges, sinking fund requirements and cumulative preferred dividends, were exchanged for Parmelee common shares: (R. 812-813, 925-928) The upshot of these negotiations was that Markin, on the insistence of the Raskob-duPont group, transferred to CCM in exchange for 58,447 CCM shares all his Motor Cab stock which had a net tangible book value of $1,461,175 ($25 per share times 58,447 shares, Ex. 60, R. 1079), and CCM transferred this Motor Cab stock, plus its debenture and preferred stock holdings in exchange for 422,787 Parmelee common shares (Ex. 60, R. 1079; Ex. 61, R. 1081-1082; Ex. 64, R. 1094-1096; Ex. 70; R. 1108). Parmelee simultaneously reserved the right to use the debentures thus acquired for tender to the sinking fund in lieu of cash, as permitted in the indenture under which those debentures were issued (Ex 61, R. 1082; Ex. 62, R. 1084; Ex. 6, R. 1526).

The record is barren of any reference to cab sales with respect to this transaction. Parmelee's cab operating subsidiaries were using CCM's cabs and so were the subsidiaries of Motor Cab. Parmelee considered a combined Yellow of New York—Motor Cab operation productive of economies and a betterment of its New York cab operating position (Ex. 61, R. 1080; Ex. 63, R. 1091-1093). Nothing exists on which to predicate an intention to suppress competition of automotive manufacturers other than CCM, and nothing exists on which to predicate an intention by CCM to assure maintenance of a captive market.

Markin's subordination in CCM continued for many years. Not only were his stockholdings in CCM in September 1930 only 5 percent, while the Raskob-duPont group

stockholdings exceeded 34 percent, but the Raskob-duPont group and later the duPont interests continued until midsummer 1933 to be CCM's largest stockholders, and their representatives constituted a majority of CCM's directors (R. 816-818). In midsummer 1933 the duPonts effected a temporary ouster of Markin from CCM for a period of thirteen days, August 2-14, 1933 (R. 411, 610-611). Beginning August 14, 1933 and continuing for several years, representatives of Cord Corporation constituted the majority of CCM's directors and acted as co-signatories on CCM's checks (R. 819). Accordingly, at no time during the period under consideration was Markin in control of CCM.

Organization by Parmelee of Minneapolis subsidiary

In 1930 Yellow Cab Corporation, a taxicab operating company in Minneapolis owned by the street railways went into receivership. Claude Masters, its manager, had been employed by that company and a predecessor since 1917, and wanted to continue in the taxicab business in Minneapolis. Masters had met Markin in the early 1920's when Masters' company had bought CCM cabs. (R. 894-895)

In 1930, while Yellow Cab Corporation was in receivership, Masters, on his own initiative, came to Markin and suggested that Markin purchase Yellow Cab's assets from the receivers. Markin declined. Subsequently, in December 1930, Masters, on his own initiative, again came to Markin and informed him that Yellow Cab's assets were to be sold at auction on receivership sale on December 31, 1930. Masters' interest was to get a job. Markin referred Masters to L'Amoreaux, and L'Amoreaux, acting for Parmelee, purchased Yellow Cab's assets on this re-

ceivership sale for $16,305. (R. 894-897, 898; Ex. 48, R. 1067) Markin was not, as stated at page 17 of the Government's brief, "the moving spirit"; Masters was, and his motivation was to continue his job in the taxicab business in Minneapolis.

In January 1931, Parmelee formed Yellow Taxi Company of Minneapolis as a wholly owned subsidiary, to which were transferred the assets purchased on the receivership sale (R. 897; Ex. 48, R. 1067).

Temporary Cab Operations in Chicago of DeLuxe Motor Cab Co. and Chicago Cab Co.

In 1927, two years before the alleged conspiracy, Markin acquired the stock of DeLuxe Motor Cab Company in order to liquidate the liabilities owing by DeLuxe to Commercial Credit Corporation on unpaid installments on the purchase price of CCM cabs which had been financed by Commercial Credit Corporation (R. 815).

In 1930, DeLuxe was sold by Markin to Parmelee, and later that year its cab operation was transferred to Chicago Cab Company, a Parmelee subsidiary formed for that purpose. Chicago Cab Company continued until 1932 when its operation ceased. (R. 748, 815)

While a Parmelee subsidiary, DeLuxe bought two cabs, both of which were CCM cabs. Chicago Cab Company did not buy any cabs. (R. 748, 815)

Obviously, an intent to coerce DeLuxe into buying CCM cabs could not have underlain Markin's sale of DeLuxe to Parmelee, since DeLuxe was owned before such sale by Markin and even before Markin's ownership

was a CCM customer (R. 815). Two comments of the Government relating to DeLuxe should be corrected. At pages 17-18 of its brief, the Government suggests that covenants concerning DeLuxe in the CCM-Checker settlement of February 5, 1930 illustrate compulsion on DeLuxe through the medium of Parmelee. This settlement, however, was formulated while Markin owned DeLuxe's stock and was not imposed by Parmelee. The reference at page 18 of the Government's brief to the desirability of combining DeLuxe with Chicago Cab to "prevent some outside company from entering the taxicab operating field in Chicago," on its face relates only to cab operations and not to cab sales.

Parmelee's Present Cab Operating Affiliates

Parmelee presently owns 29.5 per cent of the stock of Chicago Yellow. Yellow, whose parent is Chicago Yellow, operates 1,595 licensed cabs out of 3,000 licensed and 950 temporarily licensed cabs in Chicago, or 1,595 out of an aggregate of 3,950. (R. 34-35; Ex. 479, R. 1467; R. 572)

Parmelee presently owns all the stock of National Transportation Company which survived the depression as the sole New York cab operating subsidiary of Parmelee, and which operates 1,932 licensed cabs out of 11,814 licensed cabs in New York City (R. 802).

Parmelee presently owns all the stock of Yellow of Pittsburgh (into which Pittsburgh Transportation Corporation was merged pursuant to an order of the Pennsylvania Public Utility Commission made August 21, 1946, R. 901), which operates 485 licensed cabs out of 690

licensed cabs in Pittsburgh. Pittsburgh has no limit on the number of licenses issuable. (R. 35, 933)

Parmelee presently owns all the stock of Yellow Taxi Company of Minneapolis which operates 125 licensed cabs out of 214 licensed cabs in Minneapolis (R. 35; Ex. 481, R. 1471).

The Government argues, at pages 29-33 of its brief, that Yellow must be considered to be controlled by Parmelee because the stock ownership of Parmelee in Chicago Yellow, which originally was 26 percent and presently is 29.5 percent constitutes "actual" control. In support of this argument of "control," the Government, out of the abundance of its investigation of all the files of the defendants since their formation (R. 333, 588), refers to the 1933 syndicate agreement between Markin and Cord Corporation, the 1933 sale of Chicago Yellow shares with option to repurchase in lieu of a loan, a letter to a trade creditor, a suggestion for a voting trust which was never accomplished, and letters concerning personal differences as to two directors of Chicago Yellow. The reference in the Cord syndicate agreement, drawn by Cord counsel while Markin was ousted from CCM, is merely to an ancillary promise of cooperation (Ex. 485, R. 1473). The reference to notice by "CCM's lawyers" during the period of Markin's ouster, concerning non-exercise of Parmelee's option to repurchase the Chicago Yellow shares sold by it, is misleading; the firm mentioned was not CCM's lawyers (R. 598, 618), and the transaction concerned was not basically a sale but a loan—the device of sale coupled with an option to repurchase was used in lieu of a collateralized loan because the governing inden-

ture prohibited a pledge of securities owned by Parmelee (R. 844, 860). The letter to the trade creditor was merely a casual credit reference (R. 1212). The phrase in the suggested voting trust which never was accomplished included Chicago Yellow shares owned by others than Parmelee (Ex. 150, R. 1221). The directors' dispute concerned merely a representation by Parmelee on Chicago Yellow's board to the extent of only two out of nine directors (Ex. 180, R. 1249; Ex. 181, R. 1249-1250). It is interesting that the prospectus prepared by Parmelee's underwriters, J. A. Sisto & Co. and White Weld & Co., stated that Parmelee acquired "a controlling interest" in the stock of Yellow of New York and The Parmelee Company but only a "substantial amount" of the stock of Chicago Yellow (Ex. 6, R. 1521). The Government's assertion of "actual" control by Parmelee over Checker Yellow is, accordingly, hardly supported by adequate evidence, but in any event it does no more than attempt to place the affiliation between Parmelee and Yellow on a level equivalent to that between Parmelee and its three wholly-owned subsidiaries in New York, Pittsburgh and Minneapolis.

Relation of CCM to Checker and Evolution of Cab Sales

Checker was formed in 1919 (R. 745). Its original stockholders were a group of taxi drivers who transferred legal title to their cabs to Checker so that under the laws which required display on the outside of cabs of the names of their legal owners, the common name "Checker" might be used (R. 746; D-19, R. 1666). Checker performed services for these driver-stockholders, such as telephone, cab-

stand, garage, repairs, insurance and the like, for which it received service payments (R. 746).

Checker, desiring a uniform purpose-built cab with which to compete with the "Yellow" purpose-built cab, was the source of CCM's first orders (R. 745, 804). Indeed, CCM's name, "Checker Cab Manufacturing Corporation" was derived from Checker, the operating unit (R. 803).

In 1925 a five year exclusive contract was made between CCM and Checker for the supply of Checker's requirements of cabs. During the latter part of the 1920's, however, unruly elements controlled the management of Checker, and disputes occurred with respect to the purchase of cabs from CCM during this five year exclusive contract. These disputes were finally settled on February 5, 1930—after commencement of an action and referral to a Special Master who found that the 1925 contract was valid and that Checker had broken it—by a substitution of a new five year exclusive contract expiring February 4, 1935 (Ex. 88, R. 1122-1134; R. 805) which was essentially a means of liquidating damages (Id., R. 1130).

The attorney for CCM in this prolonged litigation was Paul C. L'Amoreaux. The fee arrangement between L'Amoreaux and CCM was contingent, and as a method of paying L'Amoreaux for his services, Cab Sales & Parts Corporation was formed, with L'Amoreaux as its sole stockholder, to receive compensation on CCM sales to Checker during the substituted five year period. By this method, the amount of L'Amoreaux' fee depended on the practical result of his settlement of the lawsuit. (R. 806-807)

In 1931 the president of Checker was Robert McLaughlin, brother of Eugene McLaughlin who was a notorious character in Chicago (R. 753, 808). This was a period of force and violence in the operation of taxicabs on the streets of Chicago (cf. Opinion of Corporation Counsel of City of Chicago, September 11, 1945 (Ex. D-18, R. 1658). Robert McLaughlin desired to withdraw from Checker and suggested the sale to L'Amoreaux of the majority of Checker's stock (R. 807-808). L'Amoreaux thought this a good purchase, and Cab Sales obtained a substantial sum from Markin personally for this purpose (R. 808). Additionally, between 1931 and 1932, Cab Sales borrowed for this purpose an aggregate of $700,000 from Benzoline Motor Fuel Co. and The Waverly Corporation, subsidiaries of Yellow. The Benzoline loan was effected in connection with a fuel contract between Benzoline and Cab sales, and both loans were secured by all the acquired Checker stock (Ex. 95, R. 1145; Ex. 101, R. 1158-1161). The aggregate interest and fuel profit received by Benzoline from its loan until its repayment in 1943 was $394,672.66, but an additional important motivation for these loans was Yellow's desire that taxicab operations in Chicago be placed on a business level instead of a level of force and violence (R. 843-844).

Samuels' testimony, to which the Government refers at page 22 of its brief, had no reference to any sales of cabs. Samuels testified very plainly concerning Yellow's motivation to place Chicago cab operations on a business level and not on a level of force and violence. He said, "it was one thing to have people battling against you all the time on the streets and causing the business to get into the field

where people were afraid to ride in cabs. It was another thing to stabilize the industry, and we felt that by this type of loan, where we had ample security, that our competitor would feel a sort of friendly interest in us rather than an antagonistic interest in us" (R. 843). By "friendly interest," he referred to competition "on a business level and business basis"; by "unfriendly interest," he referred to "riots, disturbances, shootings and everything else that went with it" (R. 843). Samuels also testified that Yellow did not itself try to buy Checker because the Checker interests would probably have not been willing to sell their stock to Yellow, and because Yellow desired to avoid any imputation of monopoly by Yellow in Chicago cab operations (R. 843). This was a transaction, accordingly, concerned solely with operations in Chicago, and not with cab sales by CCM.

Between 1931 and 1935 Checker continued its same form of operation under which the individual drivers bought their cabs and paid service charges to Checker. During this period, however, two things occurred. First, extraordinary arrearages of service charges accumulated, of which by 1935 $297,386.65 was charged off as bad debts (Ex. D-3, R. 1599). Second, the drivers also defaulted on the purchase installments on their cabs, with the result that cabs were abandoned or Cab Sales was required to repossess them (R. 749 Ex. 93, R. 1143-1144). In 1933, as a matter of experimentation, a so-called Shapiro fleet was introduced which consisted of a number of cabs operated as a unit by Cab Sales, as distinguished from individual operation by individual drivers. This experimental operation was successful. (R. 750-752)

In 1935 Cab Sales bought 500 new CCM cabs. This was a minority of the total number of cabs operated by Checker, but Cab Sales operated these 500 cabs as a fleet while the individual drivers within Checker operated their cabs individually. Between 1935 and 1941, however, the individual drivers gradually dropped out as a result of their difficulties of operation, their inability or unwillingness to pay their service charges, and their inability or unwillingness to pay the installments on their purchases of cabs, so that by 1941 all "Checker" cabs were operated as a fleet by Cab Sales. (R. 752)

Present affiliation of Cab Sales and CCM

The flow is not from manufacturer to operating company, but vice versa. CCM owns no stock of Cab Sales. Cab Sales owns 35.7 percent of CCM's stock (R. 36). Markin owns all Cab Sales' stock and 12.2 percent of CCM's stock (R. 36).

CCM's Cab a Superior Purpose-Built Cab

A purpose-built cab is a vehicle built for the purpose of use as a taxicab. Its essential characteristics are safety, assembly of parts in such manner as to afford low maintenance cost, driver appeal and passenger appeal. (R. 758-760, 798, 819-820)

CCM has always manufactured a purpose-built cab. Its Model K, produced in 1928, established a reputation of superiority for CCM's cabs. (R. 804-805, 819, 838-839, 910; Ex. D-9, R. 1612)

Although purpose-built cabs were sometimes produced by other manufacturers during the period subsequent to

1928, CCM has been the only manufacturer continuously engaged in such production (excluding the war and reconversion periods of World War II) (R. 829, 841). The vehicles used as cabs which are produced by the large automotive manufacturers are pleasure cars converted or adapted to use as taxicabs (R. 823).

The judgment of Checker, Yellow and the cab operating subsidiaries of Parmelee has been that the CCM purpose-built cabs better serve their large city needs than converted pleasure cars (R. 760; Ex. 186, R. 1259-1260; Ex. 329, R. 1347-1348). In 1928, Yellow experimented with 10 stock model Buicks but found them "impractical" (R. 669, 837, 838)—these are the Buicks to which the Government refers at page 13 of its brief. Consideration of the purchase of cabs from manufacturers other than CCM was especially given by Yellow in 1935, during which year Yellow reviewed the specifications of the various cabs which might be manufactured for Yellow by various of the automotive manufacturers (R. 839-841). Thus, at a directors' meeting on March 28, 1935, specifications of the proposed cabs of the following manufacturers were reviewed: Auburn, Nash, Ford, Packard, Pontiac and Buick. This review indicated that the purpose-built cab of CCM was superior for Yellow's large city needs (Ex. 186, R. 1259-1260; R. 839-841). The Government argues, at pages 31-32 of its brief, that conditions suggested by Chicago Yellow with respect to Yellow's 1935 cab purchase from CCM were not included in the resolution of Yellow's directors authorizing such purchase. The record does not contain the actual contract, but the imposition of conditions by Yellow in purchase contracts with CCM is indicated by the 1936 contract which prohibited CCM from

selling during the ensuing year any later model CCM cab to others in Chicago than Yellow (Ex. 323, R. 1343).

In 1947 Cab Sales, Yellow and the Pittsburgh and Minneapolis cab operating subsidiaries of Parmelee replaced their fleets with converted Chevrolets, Plymouths, and Fords principally (R. 622, 668, 754, 901). The operating experience of these companies with these converted cars reinforced the judgment exercised by them for many years that the CCM purpose-built cabs better served their large city needs (R. 792-796, 797-798).

The Tendency to Uniform Cab Purchases by Fleets Operating in the Larger Cities of the United States

Taxicab regulations by municipalities prevail throughout most of the large cities of the United States, and in substantially all of them cab operations are conducted through fleets rather than as individual driver operations. In most of these cities a large proportion of the licenses are held by one or two operating companies (R. 822; Ex. D-14, R. 1629-1643).

These fleet operations generally utilize a uniform cab, and replacements of such fleets are commonly obtained from the same manufacturer (R. 823). Thus, the purchase and replacement of CCM cabs by Cab Sales, Yellow and the cab operating subsidiaries of Parmelee conform to the general method of purchase and replacement by all operating companies. The suggestion at pages 50-51 of the Government's brief that the "Yellow" companies' initial purchases of CCM cabs were "contrary to the usual practices * * * of sticking to one manufacturer" ignores the prior withdrawal of the Yellow companies' previous source of supply.

No Contracts Exist for Exclusive Purchases of CCM Cabs by Cab Sales, Yellow or any of the Cab Operating Subsidiaries of Parmelee

No contracts for exclusive purchases of CCM cabs exist (R. 823).

CCM never had a contract for exclusive purchases by Yellow or any of the cab operating subsidiaries of Parmelee. The only sales contracts between CCM and Yellow or the cab operating subsidiaries of Parmelee were for specified numbers of cabs with specified delivery dates. (R. 823-824, 841, 849-850).

The only exclusive purchase contracts between CCM and Checker were the five year contract of 1925 and the substituted five year contract of 1930 representing the settlement of CCM's action against Checker (Ex. 88, R. 1182).

Comparison of Cab Sales by CCM Before and After January 1, 1929

A comparison of the sales of cabs by CCM before and after January 1, 1929 discloses no increase suggestive of monopolization or restraint of cab sales. During the period 1922 through 1928, CCM manufactured and sold an aggregate of 8,019 cabs, or an average of 1,336 cabs per year. During the period 1929 through 1942, CCM manufactured and sold an aggregate of 29,260 cabs or an average of 2,090 cabs per year (Ex. D-13, R. 1628; Exs. 453-454, R. 1458; Ex. 459, R. 1461-1463). The Government's tabulation, at page 27 of its brief, of CCM cabs "purchased", represents a partial duplication since it counts separately a direct purchase from CCM of a new cab and a repurchase of that same cab in a used condition from another operating company. The period of 1942 through 1947 is omitted from consideration since CCM was, during this period, engaged

in war production and reconversion from war production and sold no cabs.

CCM's pre-1929 customers included all present cab operating companies under consideration in this action, or one or more of their predecessors, except Yellow in Chicago (R. 804, 814).

Of the 29,260 cabs manufactured and sold between 1929 and 1942, 16,996 were sold to cab operating companies mentioned in this action, and 12,264 were sold to complete outsiders. The Government's argument, at page 27 of its brief, that these statistics indicate "the extent to which CCM's welfare depends upon control of the operating companies" ignores the limits of CCM's production capacity (Ex. 246, R. 1305-1306) and the natural tendency of CCM to supply the cab requirements of its affiliates.

Comparison of CCM's Cab Sales to Total National Cab Sales, and Position of CCM in Relation to Other Automotive Manufacturers

General Motors, Chrysler, Ford and Packard are the principal manufacturers of automobiles used as cabs in the United States (R. 823).

Comparison of the sales of cabs by CCM with national cab sales and national automotive production discloses CCM as an extremely small manufacturer.

About 85,000 cabs have been in operation annually during the period since 1928 (R. 821). CCM's annual sales during this period averaged 2,090 (Ex. D-13, R. 1628).

As compared with CCM's average annual production since 1928 of 2,090 units, the total national automotive production was 5,358,420 units in 1929, 4,797,587 units in 1947,

and varied, between 1929 and 1947, from a low of 699,828 units in 1943 to the 1929 high of 5,358,420 units (Ex. D-2, R. 1597-1599).

Comparison of Total Assets and Liabilities of CCM, Parmelee and Chicago Yellow

CCM, Parmelee and Chicago Yellow are all public corporations. A comparison of the total assets and liabilities shown by their financial statements published most recently before the trial of this action, discloses that, excluding CCM's investment in Parmelee and Parmelee's investment in Chicago Yellow, CCM is the smallest of the three. CCM's total assets and liabilities, exclusive of its Parmelee shares, were $5,555,053.37; Parmelee's, exclusive of its Chicago shares, was $10,345,780.29; and Chicago Yellow's was $6,400,707.97 (R. 932-933).

Municipal Regulations of Taxicabs and Rates

The operations of taxicabs in Chicago are comprehensively regulated by ordinances of the City of Chicago (Ex. 356, R. 1362-1364; Ex. 359, R. 1368-1373; Ex. 388, R. 1404-1405; Ex. 411, R. 1429-1430). These ordinances control the physical requirements of taxicabs, as, for example, "the number, kind, type of equipment," "the color scheme and character of equipment" and "physical and mechanical standards for taxicabs and their appurtenances." They also control and establish the rates. Similarly, municipal regulations control taxicab operations and rates in New York City, Pittsburgh and Minneapolis (Ex. D-14, R. 1629-1643). The rates in these four cities and particularly Chicago and New York are among the lowest in the entire United States (Ex. D-14, R. 1632-1643).

SUMMARY OF ARGUMENT

On the prior appeal (*United States* v. *Yellow Cab Co.*, 332 U. S. 218) this Court determined merely that the complaint, as a pleading, would permit proof of a conspiracy aimed at the suppression of taxicab sales competition by automotive manufacturers other than CCM. An aim to suppress competition differs even from the purpose to assure a market by purchase of an outlet (*United States* v. *Columbia Steel Co.*, 334 U. S. 496). The Government's argument on the present appeal, that the intent motivating the affiliation of the appellees was "to assure a captive market for CCM cabs", both departs from the theory of the prior appeal and runs counter to the Columbia Steel decision. The District Court properly found that the appellees did not conspire to suppress competition in the sale of taxicabs by automotive manufacturers other than CCM, or even to coerce purchases of CCM cabs.

The Government's specifications of error do not urge that, in the absence of a proscribed specific intent, unreasonable restraints exist, and the District Court properly found that no unreasonable restraints do exist. Absent a specific intent which *per se* violates the Sherman Act when directed against an "appreciable segment of commerce", the question of reasonableness of restraint involves the nature of the restraint, delineation of the appropriate market and type of product, and other factors including, in this case, municipal regulation. The findings of the District Court against unreasonable restraint are sustained by an analysis of these factors.

Because of historical relationship, differences in affiliation, and the public character of some of the appellees, divestiture should not be directed in the event of reversal, without affording opportunity to the District Court, after full hearing, to determine the requisite relief.

ARGUMENT

I.

The Government's theory that the purchase of an outlet with the intent to assure a market constitutes a violation of the Sherman Act, regardless of the reasonableness of the resulting restraints, is opposed to the Columbia Steel case and misapplies the pleading decision of the first Yellow Cab case. When only reasonable restraints result, no Sherman Act violation occurs unless the purchase is aimed at a suppression of competition.

United States v. *Columbia Steel Co.*, 334 U. S. 495, squarely held that the purchase of an outlet with the specific purpose of assuring a market for an appreciable segment of interstate commerce did not constitute a violation of the Sherman Act. Mr. Justice Reed, writing the majority opinion, adverted to the testimony of the president of United States Steel, that "United States Steel's purpose in purchasing Consolidated was to assure a market for plates and shapes produced at Geneva" (id. p. 506); and said that "the acquisition of a firm outlet to absorb a portion of Geneva's rolled steel production seems to reflect a normal business purpose rather than a scheme to circumvent the law" (id. p. 533). Indeed, the answer in the *Columbia*

Steel case expressly admitted an intention to supply "the entire demand of the acquired business for rolled steel products" and that a "major purpose of said purchase is to supply an outlet for rolled steel products produced at the Geneva Steel Plant" (Columbia Steel Record, pp. 21-22).

On the instant appeal, the Government argues that an intent "to secure control of cab operating companies and thereby to assure a captive market for CCM cabs," constitutes a Sherman Act violation (Govt. Br., p. 41). But that is the very intent which the *Columbia Steel* case held was not a violation of the Sherman Act.

The first Yellow Cab appeal, *United States* v. *Yellow Cab Co.*, 332 U. S. 218, did not hold that a purchase of a cab operating company to assure a market for CCM cabs violated the Sherman Act. It held rather that the complaint, as a pleading, would permit proof of a conspiracy aimed at the suppression of competition of competitors of CCM. The distinction, as a matter of specific intent, is between a business purpose to assure a market, and a predatory purpose to suppress competition. The complaint in the Yellow Cab case alleged "a combination and conspiracy to restrain and to monopolize interstate trade and commerce in the sale of motor vehicles for use as cabs" (R. 8). Such allegations of "conspiracy", said Mr. Justice Murphy, are not vulnerable to a motion to dismiss the pleading when "an appreciable segment of interstate cab sales" is involved; an "allegation that such a segment has been or may be monopolized or restrained is sufficient" (id. p. 226). Mr. Justice Murphy recognized that the test of reasonableness of restraint applied to the acquisition of an assured market for the purchaser's product when he said, "The

test of illegality under the Act is the presence or absence of unreasonable restraint on interstate commerce" (id. p. 227), but left for trial the question whether restraint and monopolization were "the primary object of the combination" (id. p. 227).

The authorities cited by Mr. Justice Murphy show that he considered the allegations of conspiracy sufficiently broad to permit proof of predatory suppression of competition. *Associated Press* v. *U. S.*, 326 U. S. 1, *Montague & Co.* v. *Lowry*, 193 U. S. 38, and *Binderup* v. *Pathe Exchange*, 263 U. S. 291, cited at pages 226 and 227 of 332 U. S., were all cases aimed at a suppression of competition; none of them concerned the purchase of an outlet. *United States* v. *Reading Co.*, 253 U. S. 26, and *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, cited at pages 227 and 228 of 332 U. S., were plain instances of predatory suppression of competition.

The argument of the Government, on the first Yellow Cab appeal, was likewise that the complaint alleged a conspiracy to suppress the competition of cab manufacturers other than CCM. Thus, the Government's brief on that appeal argued, at pages 27-28, that the "conspiracy" was "intended to prevent manufacturers of taxicabs other than CCM from selling their products".

But the Government's attempt in the Columbia Steel case to argue that the first Yellow Cab case "stands for the proposition that it is illegal *per se* for a manufacturer to preempt any market for his goods through vertical integration provided that an 'appreciable' amount of interstate commerce is involved", was rejected (334 U. S. at p. 521).

Columbia Steel held that "the legality of the acquisition * * * depends not merely upon the fact of that acquired control but also upon many other factors", and that "exclusive dealings * * * brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product" (id., p. 524).

Accordingly, this Court said in the Columbia Steel case of its decision on the first Yellow Cab appeal:

> "We do not construe our holding in the Yellow Cab case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other competitor producers to market their rolled steel. In discussing the charge in the Yellow Cab case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act. In the complaint the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true. * * * A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se. * * * Nothing in the Yellow Cab case supports the theory that all exclusive dealing arrangements are illegal per se.
>
> "A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid" (pp. 521-523).

United States v. *Paramount Pictures, Inc.*, 334 U. S. 131, 174, likewise defines the proscribed specific intent as one aimed "to restrain or suppress competition":

> "In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition rather than an expansion to meet legitimate business needs. United States v. Reading Co., 253 U. S. 26, 57; United States v. Lehigh Valley R. Co., 254 U. S. 255, 269-270. Second, a vertically integrated enterprise, like other aggregations of business units (Aluminum Co. of America, 148 F. 2d 416) will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so."

The Government argues at pages 59-62 of its brief that the acquisition in the Columbia Steel case differed from those in the instant case because Columbia Steel involved a 100 percent acquisition whereas the instant case involved some acquisitions of less than 100 percent. But if the Government's attack is against a purchase to assure a market, the attack does not gain strength because the assurance is less than 100 percent. In the Paramount case, many of the vertical integrations with exhibitors included affiliations of less than 100 percent. The Government also argues, at page 59 of its brief, that Columbia Steel presented a "question of integrating stages of production." But in that case Mr. Justice Reed

said of vertical integration: "It is an indefinite term without explicit meaning" (334 U. S. at p. 525). Nor did the acquisition in the Columbia Steel case blend the stages of rolled steel production and the fabrication of such rolled steel products; and in the Paramount case the functions of producing or distributing motion pictures were quite distinct from that of exhibiting them.

II.

The District Court properly found that the defendants did not conspire to suppress any competition by automotive manufacturers other than CCM, or even to coerce purchases of CCM cabs.

The main competitors of CCM are General Motors, Chrysler, Ford and Packard. Nothing in the record indicates any predatory aim by any of the defendants to restrain or suppress the competition of these large automotive manufacturers or any others. If, therefore, as we argue, the specific intent which *per se* constitutes a violation of the Sherman Act is an intent to restrain or suppress competition, none exists in the instant case, and any question of violation of the Sherman Act would be relegated to the reasonableness of any restraint which arises even in the absence of such intent (*infra*, pp. 46-49). But, additionally, the District Court properly found that such stock acquisitions as did occur in the instant case were neither pursuant to "conspiracy" nor accompanied by any intent to coerce purchases of cabs from CCM.

The Government by retrospection covering a period of twenty years has attempted to discover a pattern of con-

spiracy. The business events, however, are hardly consistent with that attempt. The original "deal" which led to the formation of Parmelee was limited to two cab operating companies—Yellow and Yellow of New York. The subsequent purchase of Pittsburgh was opposed by Markin. The formation of Minneapolis resulted from the desire of the superintendent of a local cab company in receivership to continue his livelihood in the taxicab business. CCM and Checker had a relationship extending back to CCM's incorporation in 1922, and the evolution of Cab Sales was an adaptation to the changing conditions in the taxicab business in Chicago through 1941. CCM's 1929 investment of $1,000,000 in non-voting preferred shares of Parmelee was hardly the action of a conspirator whose purpose was to purchase control. The 1930 acquisition by CCM of a majority of Parmelee's common shares resulted from unforeseen business conditions, including the October 1929 stock market crash and subsequent depression, cab operating losses of Parmelee occasioned both by the depression and an unforeseen strike in Pittsburgh, the formation of a dominant Raskob-duPont stockholder group and the insistence of that group that Markin dispose of his Motor Cab stock. The argument of the Government that purchases of CCM cabs by cab operating affiliates followed immediately after such affiliation ignores the withdrawal of Yellow Cab Manufacturing Company from cab manufacture following its 1925 sale to General Motors; ignores the fact that except for Yellow in Chicago all such affiliates, or some of their predecessors, were pre-1929 customers of CCM; and ignores the quality of and acclaim accorded to CCM's Model K cab.

The evidence included both documents and testimony. Available witnesses testified as to events, conditions and reasons. The trial court believed that testimony. The Government's arguments, largely speculative, are in disregard of that testimony. In no event, on the evidence, should the findings of the trial court be disturbed on the ground of a "definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395.

III.

The Government's specifications of error do not urge that, absent a proscribed specific intent, unreasonable restraints exist; and no such unreasonable restraints do exist.

The specifications of error urged by the Government at pages 34-35 of its brief, relate only to the question of specific intent, and the Government neither includes in those specifications nor argues in the body of its brief that, absent such intent, the affiliation between CCM and the cab operating companies coupled with the sale of cabs by CCM to its affiliates constitute an unreasonable restraint. The question of unreasonable restraint, apart from a proscribed specific intent, is, therefore, not reviewable by this Court. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 180.

But, even if the question were reviewable, no unreasonable restraint exists.

Nature of Restraint. On the evidence, the only arguable restraint is the fact of affiliation. But affiliation is not invalidated, said this Court in the Columbia Steel case,

by the result that "a subsidiary will in all probability deal only with its parent for goods the parent can furnish" (334 U. S. at p. 523). The following factors argue forcibly against even the existence of restraint. The cab purchases by Parmelee's cab-operating subsidiaries and Cab Sales, or some of their predecessors, were purchases either to fill the void caused by the withdrawal from cab manufacture of Yellow Cab Manufacturing Company, or were by pre-1929 customers of CCM. They were purchases of a superior purpose-built cab. They were purchases by cab operating companies accustomed to purpose-built cabs, from the only substantial and continuous manufacturer of purpose-built cabs. Comparisons with cars produced by other manufacturers showed that the CCM cab better served their large city needs. Earlier experiments with pleasure cars and post-war experience with pleasure cars confirmed this judgment that the CCM cab better served these needs. Thus, judgment, comparison and experience supplemented the normal practice prevailing among cab operating companies throughout the United States to continue the purchase of cabs from the same manufacturer in order to obtain the benefits of similarity in operation, maintenance and the like.

Comparable Market and Type of Product. In the absence of a specific intent which *per se* violates the Sherman Act when directed against any "appreciable segment of commerce," the question of reasonableness of restraint involves delineation of the appropriate market and type of product (*United States* v. *Columbia Steel Co.*, 334 U. S. 495, 508-511). The result of CCM's cab sales to the cab operating subsidiaries of Parmelee and to Cab Sales is to exclude sales of cabs, in a like amount, by automotive

manufacturers other than CCM—General Motors, Ford, Chrysler and Packard. The sales of these large automotive manufacturers are, however, national in scope and in comparison with the sales of any of them, the cab purchases by the cab operating affiliates of Parmelee and Cab Sales are infinitesimal. This argument that the impact of the sales by CCM to these cab operating companies must be measured against the national sales of these large automotive manufacturers is not in derogation of the decision on the first Yellow Cab appeal, since we are concerned now not with a proscribed specific intent directed against an appreciable segment of commerce, but with the measurement of the impact of these sales by CCM against those who constitute the excluded manufacturers.

Measurement involves not only the manufacturers excluded but also the type of product—here the automobile. The complaint refers to "motor vehicles" for use as cabs; the Government's brief, at page 62, refers to CCM's business as "manufacturing automotive vehicles"; and the Government argues that the cab operating affiliates of Parmelee and Cab Sales should use stock cars manufactured by the large automotive manufacturers rather than purpose-built cabs manufactured by CCM. When the product is defined as the automobile, the sales by CCM to Chicago, New York, Pittsburgh and Minneapolis become insignificant in relation to the sales of automobiles to those cities by the large automotive manufacturers. That the automobile is a sufficient limitation of the type of product is indicated by the statement in the Columbia Steel case that "the demand for the product must be measured against the market for all comparable products" (334 U. S. at pp. 510-511).

Municipal Regulation. The impact on the public in the localities which the operating companies serve is not the purchase but the use of the cabs. It is not the purchase, because the cabs are not bought for resale; it is the use, since the operating companies' use of the cabs constitutes the service to the public. This use is, however, subject to regulatory municipal control. In Chicago, for example, the municipal ordinances control the physical requirements of cabs, such as "the number, kind, type of equipment," "the color scheme and character of equipment," "physical and mechanical standards for taxicabs and their appurtenances." They also establish and control the rates. The quality of cabs used by the operating companies is subject to comparison with that of cabs used elsewhere in the United States. Similarly, the municipality in establishing rates for cab services may compare the price of such cab with the price of cabs produced by other manufacturers throughout the United States. In fact, the rates in the cities of Chicago, New York, Pittsburgh and Minneapolis are among the lowest in the United States.

IV.

In the event of reversal divestiture should not be directed.

The Government requests divestiture separating CCM from Parmelee and Cab Sales. This drastic remedy should in no event be applied without affording to the District Court opportunity after a full hearing to determine the requisite relief. See *Associated Press* v. *United States*, 326 U. S. 1, 22; *United States* v. *Crescent Amusement Co.*, 323

U. S. 173, 185. The prayer for relief in the original complaint did not seek a severance of Checker-Cab Sales and CCM. The historical relationship between Checker-Cab Sales and CCM goes back to CCM's organization in 1922. Nor were all the present affiliates of Parmelee acquired; for example, two, the New York and Minneapolis companies, were organized. Again, Parmelee and Chicago Yellow as well as CCM are public corporations with securities listed on the New York Stock Exchange. In the event of reversal, opportunity should exist for ample consideration of these and other matters by the District Court.

CONCLUSION

The judgment of the District Court should be affirmed in its entirety. As noted, the Government does not urge error in respect of that portion of the case, covered by the judgment, which relates to Parmelee's interstation transportation.

Respectfully submitted,

GALLOP CLIMENKO GOULD & LYNTON
Attorneys for Appellees

JESSE CLIMENKO
HAROLD S. LYNTON
of Counsel

November, 1949.